

LIM KENG SIONG & ANOR. v. YEO AH TEE

[F.C. (Salleh Abas C.J. (Malaya), Abdul Hamid & Seah F.JJ.) February 9 & March 21, 1983]

[Kuala Lumpur – Federal Court Civil Appeal No. 164 of 1982]

Contract – Correspondence – Whether there was concluded contract – Term “Subject to contract” – Expression of desire of parties as to manner in which transaction already agreed to will in fact go through.

In this case the appellant wrote to C.H. Williams, Talhar & Wong Sdn. Bhd. on March 1, 1976 as follows:

“I confirm, subject to contract, that the lowest price I am willing to sell the said property is \$5.40 per square foot in Singapore currency, the sale and purchase to be completed latest by March 24, 1976. Ten per cent deposit to be paid within the course of the next few days if your buyer Mr. Yeo Ah Tee agrees to the price and the terms”.

There were further negotiations and eventually Messrs. C.H. William, Talhar & Wong Sdn. Wrote on March 3, 1976 to confirm the sale –

“We refer to our telephone conversation this afternoon in which you have kindly accepted our Client’s (Mr. Yeo Ah Tee) further offer regarding the above, with vacant possession at a price of \$5.20 per square foot for \$454,391.60 cents Ringgit, Four hundred and fifty four thousand three hundred and ninety one dollars and cents sixty only. The sale is to include all buildings, plant and machinery and all ancillary facilities etc. We have received further instructions to inform you that our client has appointed Messrs. Ting Poi Tak & Co. of 30 Jalan Laksamana as his solicitors to deal with all legal matters pertaining to the above sale. Messrs. Ting Poi Tek & Co. will communicate direct with you regarding the sale”.

The appellants in this case refused to complete the agreement and the respondent applied for specific performance. In his statement of claim the respondent averred that there was a concluded contract and this was specifically admitted by the appellants in their statement of defence. The appellants in their defence stated that the sale was subject to contract and that they had informed the respondent’s solicitors that they did not wish to sell the property. Wan Yahya J. ordered that the agreement of sale be specifically performed and carried into execution. The appellant appealed.

Held, on the evidence and the exhibits in this case it was the intention of the parties to come to a definite and complete agreement on the subject of the sale and the mere fact that a written agreement had to be drawn up and executed by them did not necessarily mean that there was no legally binding and enforceable agreement. A legally binding and enforceable agreement was concluded on March 3, 1976 and the learned Judge had not erred either in law or fact in arriving at the finding that he did.

Cases referred to:

- (1) *Tai Tong Realty Co. (Pte) v. Galstaun & Anor.* [1973] 2 M.L.J. 95.

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- (2) *Spottiswoode, Ballantyne & Co. Ltd. v. Doreen Appliances Ltd.* [1942] 2 K.B. 32.
 (3) *Wilson v. Balfour* (1929) 45 T.L.R. 625.
 (4) *Masters & Anor. v. Cameron* (1954) 91 C.L.R. 353.
 (5) *Palaniappa Chettiar v. Tan Jan & Anor.* [1965] 1 M.L.J. 182.
 (6) *Griffiths v. Young* [1970] Ch. 675.
 (7) *Bigg & Anor. v. Boyd Gibbins Ltd.* [1971] 2 All E.R. 183.
 (8) *J.N. Roland and Scott Ltd. v. Yangtze Kiang Garment Manufacturing Co Ltd.* (1978) 8 Hong-kong Law Journal p. 63.
 (9) *Harichand v. Govind* (1923) 50 I.A. 25.
 (10) *Shankarlal Narayandas Mundade v. New Mofussil Company Ltd.* (1946) 73 I.A. 98.
 (11) *Daiman Development Sdn. Bhd. v. Matthew Lui Chin Teck* [1978] 2 M.L.J. 239.
 (12) *Kelly v. Park Hall School* [1979] C.L.Y.B. para 2768.
 (13) *Wong Kup Sing v. Jeram Rubber Estates Ltd.* [1969] 1 M.L.J. 245.
 (14) *Von Hatzfeldt-Wildenburg v. Alexander* [1912] 1 Ch. 284.
 (15) *Masters v. Cameron* 91 C.L.R. 353.
 (16) *Daiman Development Sdn. Bhd. v. Matthew Lui Chin Teck* [1981] 1 M.L.J. 56.
 (17) *Bonnewell v. Jenkins* (1878) 8 Ch. D. 70.
 (18) *Bolton Partners v. Lambert* 41 Ch. D. 295.
 (19) *Godecke & Anor. v. Kirwan* (1973) 1 A.L.R. 457.

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HIGH COURT.

Thara Singh Sidhu (Ting Poi Teck with him) for the plaintiff.

P. Cumaraswamy for the defendants.

Cur. Adv. Vult.

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Wan Yahya J.: As far back as 1974 the Defendants had indicated their wish to dispose of a piece of land, namely Lot 689, Mukim of Balai Panjang, Melaka. This is clearly evidenced in the letter dated December 14, 1974 (Exhibit P1) written on the instructions of the 1st Defendant and addressed to the Melaka Branch of C.H. Williams, Talhar & Wong Sdn. Nothing came out of this letter until March 1, 1976 when presumably through negotiations by phone they received another letter, para. 2 of which reads:

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“I confirm, subject to contract, that the lowest price I am willing to sell the said property is \$5.40 per square foot in Singapore currency, the sale and purchase to be completed latest by March 24, 1976. Ten per cent deposit to be paid within the course of the next few days if your buyer Mr. Yeo Ah Tee agrees to the price and terms”.

Mr Chan (PW 2), an estate valuer of C.H. Williams, Talhar & Wong, who was then in charge of this deal, acting on behalf of a buyer, i.e. the

Plaintiff, rang up the Defendant again and re-negotiated for a sale at \$5.20 per square ft., such sale to include all buildings, plants and machinery and all ancillary facilities. This was orally accepted by the Defendants in the course of that telephone conversation. Mr. Chan then, as instructed by the Plaintiff, wrote to the Defendants to confirm his acceptance of the offer to purchase the land at \$5.20 per sq. ft. and to inform the Defendants that his client (Plaintiff) had appointed Messrs. Ting Poi Teck & Co., Advocates & Solicitors, at 30 Jalan Laksmana, Melaka, to deal with all legal matters pertaining to the sale. A copy of that letter (Exhibit A1) was also extended to Messrs. Ting Poi Teck & Co. Two days later a letter was also written by Mr. Ting (PW 1) to Messrs. Chan, Goh & Co., Solicitors for the Defendants, referring to the earlier letter written by C.H. Williams (Exhibit A1) and confirming the sale. In his letter (Exhibit P2), Mr. Ting has also set out all the relevant terms of the contract, a cheque for \$45,440, the 10% deposit, and a copy of the draft agreement for the Defendants' approval and signature. The Defendants' solicitors acknowledged receipt of the letter on the 9th, banked the cheque and sat on the letter for 2 weeks. Then by a letter dated March 22, 1976, which was received by the Plaintiff on March 24, 1976, they forwarded two title deeds relating to the property and the draft contract with some amendments and unexpectedly raised the amount of deposit from 10% to 20% of the purchase price. Except for the switch of the stakeholder from the Plaintiff's solicitors to the Defendants' solicitors, the rest of the amendments are quite insignificant and they relate only to the correction of error on the actual area of the land and the consequential adjustment in the total payment to be made, the increase in percentage of deposit and deletion of the clause on forfeiture of deposit in the event of default in payment. In the last paragraph of their letter the Defendants' solicitors wrote:

"Our clients require the binding Contract herein to be entered into and the remaining deposit of \$45,447.68 (by Telegraphic Transfer) to be forwarded to us by the 31st instant, failing which the negotiation for the sale and purchase herein will be treated as abortive."

Five days after the receipt of this letter the Plaintiff's solicitors sent by express mail the additional deposit under cover of their letter dated March 29. However, they inadvertently overlooked to enclose the agreement. The agreement was however immediately despatched two

A days later on discovery of the oversight. Both letters were acknowledged by the Defendants' solicitors, vide their letter dated April 2, 1976. On the 20th of the same month the Defendants' solicitors requested for the return of the two title deeds as they were required by their clients urgently but otherwise no mention was made about the deal. The Plaintiff's solicitors wrote to the Defendants' solicitors requesting them to expedite the execution of the agreement. On May 10 they wrote in stronger terms asking for the purchase to be completed under threat of legal action. To this the Defendants' solicitors curtly answered:

"The sale is abortive. Your client may do as he pleases."

The remaining developments are quite unnecessary. The only issue to be considered here is whether there is a concluded contract of sale between the parties on March 3, 1976.

The above facts are not disputed by the Defendants and neither did they give evidence in rebuttal. They rested their case entirely on the construction of certain documents and in particular a letter (ID 1) (not included in the bundle of documents and neither was the maker called) allegedly written by the Defendants to C.H. Williams Talhar & Wong. This letter dated March 1, 1976 refers to an earlier offer made by the estate agents to sell the land at \$4.50 per sq. ft. The second paragraph of the letter reads:

"I confirm, subject to contract, that the lowest price I am willing to sell the said property is \$5.40 per square foot in Singapore currency.."

G Defendants' Counsel contends that the term 'subject to contract' as used in this letter indicated the Defendants' intention not to conclude the contract until the execution of proper documents and that as this letter forms part of the transaction, the terms should be read with and into the terms of the other letters as well as the Plaintiff's pleadings.

I am unable to accept this view. To start with, the letter (ID 1) was written to C.H. Williams. There is no evidence to show that either the Plaintiff or his solicitors had knowledge of its contents – at least not until the commencement of this case. Secondly the letter obviously refers to a firm offer by the Defendant to sell the land at not less than \$5.40 per sq. ft. Singapore currency and not at \$5.20 per sq. ft. Thus it was made during

a separate deal. Thirdly I accept the evidence of PW 2, the estate agent who negotiated with the seller, that as on March 1, 1976, i.e., the day ID 1 was written, there was no concluded contract between the parties. Fourthly, no express mention of the terms was made anywhere until March 22, after the deposit was paid and accepted, i.e., after part performance of the contract by the Plaintiff.

Counsel for the Defendants cited in argument the cases of *Tai Tong Realty Co. (Pte.) Ltd. v. Galstaun & Anor.*⁽¹⁾ *Spottiswoode, Ballantyne & Co. Ltd. v. Doreen Applicances Ltd.*⁽²⁾ *Wilson v. Balfour*⁽³⁾ and *Masters & Anor. v. Cameron*⁽⁴⁾ on the construction of the term 'subject to contract'. These cases are clearly distinguishable from the present case, as in all of them the intention of the parties was documented either in the form of written option or letter of offer or acceptance. All these documents contained the term 'subject of contract' or words to that effect accompanied by words sufficiently clear to indicate their intention not to create a binding contract between the parties. In our present case the offer to sell the property conditionally upon a formal contract being drawn up was only raised after the parties had agreed on the essential terms of the sale.

Even if the 'subject to contract' clause as contained in ID 1, of which the Plaintiff was unaware, is to be considered with the subsequent telephone conversation, I am of the view that it was not a condition or term of the bargain but was an expression of the parties' intention on how the formalities of the sale will in fact go through.

On the evidence before me I am convinced that the Defendants had intended to conclude this contract and create a binding legal obligation to sell the land as on March 1, 1976. I have arrived at this finding for the following reasons:

- (i) All the terms necessary to form the contract were orally agreed upon by the parties through the telephone conversations. When Mr. Chan of C.H. Williams, Talhar & Wong spoke to the Defendants on March 3, 1976, he was doing so on the instructions of and in the presence and hearing of the Plaintiff. This is how Mr. Chan described the deal:

"On March 3, 1976 I had a telephone conversation with Mr. Lim Keng Siong (1st Defendant) after some haggling I was instructed by Mr. Yeo to make a final offer of \$5.20 per sq ft. The sale is to include all buildings, plants and machinery and all ancillary facilities. The offer was accepted

A On March 1, 1976 nothing was concluded but on March 3, 1976 there was an offer and an acceptance and the sale was concluded."

- (ii) The terms of the contract as 'accepted' by the parties were immediately communicated to the 1st Defendant by Mr. Chan of C.H. Williams, the 1st part of which reads:

"We refer to our telephone conversation this afternoon to which you kindly *accepted* our client's further offer regarding the above, with vacant possession at a price of \$5.20 per square foot for 2,006 acres (87383 square feet) making a total sum of \$454,391.60 cents Ringgit: Four hundred and fifty four thousand three hundred and ninety one dollars and cents sixty only. The sale is to include all buildings, plant and machinery and all ancillary facilities etc." (emphasis provided)

Two days later on March 5, 1976 the Plaintiff's solicitors sent to the Defendants' solicitors a letter, the second part of which confirmed the sale as follows:

"We beg to refer you to the letter of M/s. C.H. Williams, Talhar & Wong Sdn., dated March 3, 1976 *confirming the sale* of the abovementioned land with factory building constructed thereon and the plant and machinery and all ancillary property etc., at the price of M\$5.20¢ per square foot, the carbon copy of which was extended to ourselves as solicitors for the Purchaser and a copy is enclosed herewith for your easy reference." (emphasis provided)

Neither the Defendant nor his solicitors objected to or derogated from the contents of both letters until March 23, 1976 when the Defendants' solicitors departed from the terms of the oral contract and imposed different conditions.

My impression is that the Defendants had changed their minds within the three weeks from the date of the oral agreement; otherwise they would have objected to or, in the least, corrected the impression created by the letters of March 3 & 5, 1976. Although the Defendants' solicitors wrote a letter to the Plaintiff's solicitors on March 9, they did nothing to correct the impression conveyed in both the letters.

- (iii) In the same letter the Plaintiff's solicitors enclosed 10% deposit money for the sale. This amount was accepted and banked by the Defendants' solicitors without objection.

(iv) Likewise, when the Plaintiff's solicitors sent a further 10% deposit on March 29, 1976, as requested, the Defendants' solicitors accepted and banked the cheque. The Defendants' solicitors' letter dated April 2, 1976 and a subsequent one dated 28th of the same month

contained no objection or protest to the Plaintiff's oversight for not enclosing the agreement. Most likely by that date the Defendants' solicitors must have been in possession of the agreement, which was posted on March 31, 1976 immediately on the discovery of their error. If not, they would have certainly received it by the date they sent the second letter dated April 28, 1976, but no formal objection was raised until June 14, 1976, i.e., 77 days later. Similarly the deposit amounting to \$90,887.68 was only offered in return to the Plaintiff on May 17, 1976, i.e., 49 days after it was received by the Defendants.

(v) Except for the new conditions arbitrarily imposed the amendments by the Defendants' solicitors to the Plaintiff's draft agreement were insignificant and quite immaterial to the concluded oral contract. The draft contract, to my mind, embodied all the necessary terms agreed upon orally by the parties and the Defendants were not entitled to reject or impose new terms.

(vi) In a related case, Melaka Civil Suit No. 157/78 in which the Defendants are being sued for breach of contract of sale in respect of the same land to different Plaintiffs, the Defendants' solicitors, in applying for a consolidation with this suit, filed an affidavit exhibiting the statement of claim and the defence to that suit. Mr. Cumarasamy, Counsel for the Defendants, had objected to the admission of this affidavit on the ground that they related to two different suits. To my mind, an application for consolidation of two suits refers to the proceedings in common to both the suits and would therefore form part of the proceedings in both suits. The documents exhibited to an affidavit form as much part of the affidavit as if they have been actually annexed to and filed with it – see *Palaniappa Chettiar v. Tan Jan & Anor.*⁽⁵⁾. Thus they are clearly admissible in the present proceedings.

The relevant parts of that exhibit marked LTW 4 are reproduced hereunder and italicized for emphasis:

"3(e). Sometime in early March 1976, 1st Defendant in exercise of his power as agent under the 1st and/or 2nd letter of Authorisation and in that capacity, negotiated with a firm of real estate agents in Malacca C.H. Williams, Talhar & Wong, to sell the said property. The said estate agents procured a purchaser namely one Yeo Ah Tee of Malacca (hereinafter called "YAT") who was prepared to purchase the said property at the price of \$5.20 per square foot. After certain negotiations between

A the 1st Defendant and YAT, the 1st Defendant *accepted YAT's offer* on March 3, 1976 during a *telephone conversation* with the estate agents.

(f) On March 5, 1976, Ting Poi Teck & Co., a firm of Malacca solicitors, acting for YAT, wrote to the Defendants' solicitors in Singapore, namely Chan, Goh & Company confirming the purchase of the said property at \$5.20 per square foot and enclosing a cheque for \$45,440 being 10% of the resale price. A draft agreement (hereinafter called "Agreement for Resale") was also forwarded by Ting Poi Teck & Co. to Chan, Goh & Company for approval.

(h) On March 22, 1976 the Defendants' solicitors returned to YAT's solicitors the draft agreement for Resale duly amended and approved and at the same time requested for a further 10% of the purchase price. *The Agreement for Resale fixed the date for completion on or before June 3, 1976.*

(i) On March 29, 1976 YAT's solicitors forwarded a bank draft for \$44,123.17 being the equivalent of 10% of the resale price making a total of 20% paid to the Defendants. *The Defendants accepted the bank draft which was subsequently presented for payment by the Defendants' solicitors and paid.*"

"3. (Counterclaim)

The Defendants also say that but for the wrongful conduct of the Plaintiffs in denying the right of the Defendants to complete the resale of the said property to YAT, the Defendants had suffered loss and damage in that they were deprived of the use of their share of the proceeds of resale from the date fixed for completion thereof on or about June 3, 1976. The Defendants' share of the said proceeds was \$344,198.40 made up as follows:

F	1. Sale Price	\$349,568.00
	Paid as Deposit	\$ 43,696.00
G	Balance due to Defendants	\$304,872.00
	2. (a) Resale Price	\$454,438.40
H	(b) Less Sale Price	\$349,568.00
	(c) Less Plaintiff's Share	\$ 65,544.00
I	Defendants' Share	\$ 39,326.40
	Total due to Defendants –	\$304,872.00
		+ \$ 39,326.40
		= \$344,198.40"

The above written statements also convey to my mind the unmistakable intention of the Defendants to treat the oral agreement made on March 3, 1976 as a concluded contract.

Various judicial precedents, which I consider relevant and appropriate to this case are reproduced below:

(1) In *Griffiths v. Young*⁽⁶⁾ a written offer identifying the land but expressing the price to

be subject to contract was held to be concluded when the buyer accepted the offer by telephone.

- (2) In *Bigg & Anor. v. Boyd Gibbins Ltd.*⁽⁷⁾ the vendor wrote: "As you are aware that I paid £20,000 for the property, your offer of £20,000 would appear to be a little optimistic. For a quick sale I would accept £26,000..." The Defendant wrote: "I accept your offer" and asked the vendor to contact their solicitors and subsequently, in their letter, stated "I am putting the matter in the hands of my solicitors..." It was held that the acceptance by the purchaser constituted a binding agreement.

- (3) Another case of persuasive precedent appears in *J.N. Roland and Scott Ltd. v. Yangtze Kiang Garment Manufacturing Co. Ltd.*⁽⁸⁾ In that case the purchaser negotiated with the co-vendor for the sale of certain premises. At the meeting between them they orally agreed on the purchase price and the deposit to be paid and that a written agreement would be formalised between their solicitors in due course.

It was held by all the four judges of appeal that the oral agreement was a binding 'provisional' or 'holding' contract fully enforceable until a formal contract was drawn up.

- (4) In the Indian case of *Harichand v. Govind*⁽⁹⁾ the Privy Council held that whether an agreement is a completed bargain or merely a provisional arrangement would depend on the intention of the parties and that a mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. At page 31 their Lordships of the Privy Council said:

"Here exhibits A and A1 show clearly that the parties had come to a definite and complete agreement on the subject of the sale. They embodied in the documents that were exchanged the principal terms of the bargain on which they were in absolute agreement, and regarding which they did not contemplate any variation or change. The observation in respect of a formal document to be prepared by a vakil only means that it should be put into proper shape and in legal phraseology, with any subsidiary terms that the vakil might consider necessary for insertion in a formal document."

- (5) In *Shankarlal Narayandas Mundade v. New Mofussil Company Ltd.*⁽¹⁰⁾ the offer and

acceptance were made orally in which the parties agreed upon the price, earnest money, completion date and other usual terms to be incorporated in the agreement by the solicitors. There was a dispute regarding the terms of the draft agreement and the seller refused to perform the contract. Held:

"Apart from the objection that the point was taken too late, however, the facts did not support the inference that the parties intended to be bound only when a formal agreement had been executed. On the contrary, there was ample evidence to prove that both parties intended to make, believed that they had made, and had made a binding oral agreement, and their desire and intention to put that agreement into formal shape did not affect its validity."

- (6) In *Daiman Development Sdn. Bhd. v. Matthew Lui Chin Teck*⁽¹¹⁾, Suffian L.P. delivering the judgment of the Federal Court held that a booking pro forma containing sufficient particulars of the contract was a firm contract.

In conclusion I would reiterate my finding that there clearly existed in this case the intention of the parties to conclude the agreement on March 3, 1976 itself when the Defendant agreed orally to the offer made by Mr. Chan, the estate agent, on behalf of the Plaintiff.

If I am wrong on this and that the signing of the agreement by the Defendants by a specified time was a necessary element in concluding the contract, the Defendants are nevertheless disentitled to abandon the contract because of the short period arbitrarily imposed on the return of the contract and also for the failure to notify the Plaintiff of their intention to abandon it. In this case the Defendants sent the draft agreement containing several amendments for engrossment by the Plaintiff's solicitors on March 22, and received by the Plaintiff's solicitors on March 24, giving them until the 31st to return the same. It would be fair to assume that the same passage of time would be involved in the return of the letter by post. The short period of five days within which one has to complete an important financial transaction is certainly impractical, will impose hardship and is obviously inequitable.

In the Irish case of *Kelly v. Park Hall School*⁽¹²⁾ it was held that a seven day period for the return of a contract was an arbitrarily imposed and unreasonably short period and as such it was inequitable to allow the vendors

by that device to defeat an otherwise valid agreement. Similarly by accepting the Plaintiff's cheque and banking the same, subsequently acknowledging receipt of the engrossed agreement (posted on March 31 itself) without objecting thereto for 11 week or so well past the period of the arbitrarily imposed date of completion time no longer remains the essence of the contract and the Defendants should have given notice of their intention to abandon their contract if the engrossed agreement signed by the Plaintiff was not returned — *Wong Kup Sing v. Jeram Rubber Estates Ltd.*⁽¹³⁾

For the above-mentioned reasons I find the case in favour of the Plaintiff. I have been informed by the Defendants during the course of the hearing that the land in question is still in their hands and in respect of which they are still the registered owners. The Plaintiff had all along indicated his wish to complete the sale. There shall be an order for specific performance as prayed for by the Plaintiff. The Defendants shall within four weeks of receipt of the balance of the purchase money execute a transfer of the land situated in the Mukim of Balai Panjang, known as Holding No. 689 held under section 969/61 together with the factory erected thereon known as No. 5369-C Jalan Malim, Melaka, to the Plaintiff. In the event of the Defendants' refusal to execute the transfer, the same shall be signed by the learned Assistant Registrar on their behalf.

Alternatively, if, for a good reason, it is shown that the order is incapable of performance, then there shall be an order for the rescission of the contract, the repayment of the deposit of \$90,887.68 carrying an interest of 6% per annum from the date of payment, i.e., April 2, 1976, and damages for breach of contract to be subsequently assessed by this court at a subsequent date.

The Plaintiff, being the successful party, is entitled to costs.

The defendants appealed against the above Judgment to the Federal Court.

FEDERAL COURT.

P. Cumaraswamy for the appellants.
Cecil Abraham (Thara Singh Sidhu and Ting Poi Teck with him) for the respondent.

A Abdul Hamid F.J. (delivering the Judgment of the Court). The appeal is against the decision of Wan Yahaya J. given at Malacca on June 5, 1982 ordering that the agreement of sale of a piece of land known as Holding No. 689 Mukim Balai Panjang held under S.L.G. No. 969/61 together with factory erected thereon known as No. 5369-C, Jalan Malim, Malacca (the said land) be specifically performed and carried into execution.

B There is alternative order for rescission of contract should the above order be incapable of performance. We do not see any necessity to deal with it at this point and would only do so if and when the need arises.

C The facts are not substantially in dispute. The appellants intended to sell the said land as indicated in their letter of December 14, 1974 addressed to Melaka Branch of C.H. Williams, Talhar & Wong Sdn. We mention this not to show any special significance that we attach to it but merely to highlight the fact that this intention to sell was revived as is revealed from the appellants' letter of March 1, 1976, para 2 of which reads—

E "I confirm, subject to contract, that the lowest price I am willing to sell the said property is \$5.40 per square foot in Singapore currency, the sale and purchase to be completed latest by March 24, 1976. Ten per cent deposit to be paid within the course of the next few days if your buyer Mr. Yeo Ah Tee agrees to the price and terms."

F At this point there was conceivably no question of any concluded contract. The respondent Yeo Ah Tee also had not so alleged. What is alleged is that the appellants had negotiated the sale through Messrs. C.H. Williams Talhar & Wong Sdn. and the negotiation was concluded on March 3, 1976. Messrs. C.H. Williams, Talhar & Wong Sdn. by letter of March 3, 1976 confirmed the sale. Since the contents of this letter seem pertinent to the determination of this appeal, we deem it appropriate to reproduce it in full as follows:

H "C.H. WILLIAMS, TALHAR & WONG SDN.

March 3, 1976.

Messrs. Gim Cheong & Co.,
17, Beach Road,
Singapore 7.

I

Kind Attention: Mr. Lim Keng Siong

Dear Sir,

Re: Purchase of Property Lot 689,
Mukim of Balai Panjang,
Melaka.

We refer to our telephone conversation this afternoon in which you have kindly accepted our client's (Mr. Yeo Ah Tee) further offer regarding the above, with vacant possession at a price of \$5.20 per square foot for \$454,391.60 cents Ringgit: Four hundred and fifty four thousand three hundred and ninety one dollars and cents sixty only. The sale is to include all buildings, plant and machinery and all ancillary facilities etc.

We have received further instructions to inform you that our client has appointed Messrs. Ting Poi Tek & Co. of 30, Jalan Laksamana as his solicitors to deal with all legal matters pertaining to the above sale.

Messrs. Ting Poi Tek & Co. will communicate direct with you regarding the sale.

Yours faithfully,
Sgd. ?

c.c. K.L. Office
c.c. Messrs. Ting Poi Tek & Co."

The averment which alleges that there was a concluded contract is to be found in para 3(a) of the respondent's statement of claim. This is specifically admitted by the appellants in para 1 of their statement of defence. The appellants also admit the following averments in the statement of claim —

3(b). The 10% deposit amount to \$45,400/- approximately was sent by the Plaintiff's Solicitors Messrs. Ting Poi Tek & Co. by Express Mail on March 5, 1976 enclosing therein the draft agreement for the Defendants' Solicitors' approval the receipt of which was acknowledged on March 9, 1976.

3(c). The Defendants through their said Solicitors by letter dated March 22, 1976 to the Plaintiff's Solicitors had stated and enclosed the following:—

- (1) Two title deeds relating to the property on the usual undertaking. Kindly sign and return to us one copy of the enclosed Schedule of Deeds.
- (2) One copy of your draft Contract showing the amendments made by us.
- (3) Engrossments in triplicate of the said Contract for signature by your client if our amendments to the original draft are in order.
- (4) Photostat copy of the search of the property made in July 1975.
- (5) Photostat copy of the 1975 Quit Rent receipt.

We would like to draw your attention to the following:—

- (a) The area of the property is 2 acres 0 rood 01 pole equivalent to 87392 square feet (and not 87,383 and the purchase price calculated at the rate of \$5.20 per square foot) on the correct area.
- (b) Our clients require the deposit to be 20% of the purchase price.
- (c) Our clients require the binding Contract herein to be entered into and the remaining deposit of \$45,447.68

(by Telegraphic Transfer) to be forwarded to us by the 31st instant failing which the negotiation for the sale and purchase herein will be treated as abortive.

1. By an agreement made between the Plaintiff and the Defendants the Defendants agreed to sell and the Plaintiff agreed to buy certain property situated at the Mukim of Balai Panjang, Melaka Tengah known as Holding No. 689 and held under S.L.G. No. 969/61 with factor building erected thereon and also known as No. 5369-C, Jalan Malim, Malacca and the plant and machinery therein at the price of \$454,438.40.

2. It was further provided by the said Agreement that the Plaintiff should pay a deposit of \$90,887.68 in respect of the said purchase price. The Plaintiff duly paid the said sum on March 20, 1976 and the receipt thereof was acknowledged on April 2, 1976 by letter from the Defendants' Solicitors Messrs. Chan, Goh & Co. of Singapore.

4. The Plaintiff duly executed the engrossed copies of the amended agreement and duly sent the remaining deposit of M\$45,447.68 by bank draft the receipt of both of which was acknowledged by letter dated April 2, 1976.

6. The said agreement provides for specific performance under clause 8 thereof.

These averments set out in full bear out the facts not disputed by the appellants and they help to narrow down the issues the learned Judge was called upon to determine. The picture that emerges from the pleadings thus far would not, in our view, be complete if we do not state the appellants' contentions.

First, they say the sale was subject to contract, i.e., the agreement to sell the said land was not binding until they signed and delivered the contract to the respondent.

Second, they deny signing or delivering the contract to the respondent. On May 14, 1976, their solicitors informed the respondent's solicitors that they did not wish to sell the property concerned.

Third, they denied paras 5, 7 and 8 of the statement of claim which read —

5. By the re-negotiation of the sale through their solicitors and requesting for a 20% deposit to be sent before March 31, 1976 after all the terms have been settled by the Defendants' Solicitors and requiring the Plaintiff to execute the agreement as contained in the aforesaid letter, the Plaintiff had concluded an enforceable agreement of sale.

7. Notwithstanding repeated requests by the Plaintiff the Defendants have neglected and refused and continue to neglect and refuse to take any further steps towards the completion of the said agreement of sale.

8. The Plaintiff has at all material times been and is now ready and willing to perform his obligations under the said agreement.

In our view, the appellants' denial have no merit. It is only that part of para 5 of the statement of claim where the appellants contend the word "renegotiation" supports their defence that there was no concluded and enforceable agreement of sale which calls for consideration. We shall deal with this shortly.

We also see no merit in the denial of paras. 7 and 8 of the statement of claim. There is hardly any substance in the appellants' contention that the respondent had not made repeated requests and that they (appellants) had not neglected, refused and continued to neglect and refuse to take any further steps towards the completion of the said agreement of sale. These denials are not borne out by the evidence produced before the learned Judge. In fact there is to be found in the judgment of the learned Judge to the effect that the respondent's solicitors wrote to the appellants requesting them to expedite the execution of the agreement. This was followed by another letter (May 10, 1976) in a stronger term asking for the purchase to be completed under threat of legal action but the appellants merely answered "The sale is abortive. Your client may do as he pleases." By the same token it cannot, in our view, be even suggested that the respondent had not at all material times been ready and willing to perform his obligations under the agreement.

At the hearing before us Mr. Cumaraswamy counsel for the appellants submitted what appears to us to be his main ground of appeal that the learned trial Judge erred in holding that ID1 with reference to the clause "subject to contract" did not form a condition or term of the bargain. As this appears to be the only substantial ground relied upon by the appellants, we shall consider it after we dispose the other grounds of appeal.

Grounds 1, 2 and 3 in the memorandum of appeal are taken together, the first deals with the appellants' contention that the learned Judge had erred both in law and in fact in finding that they had intended to conclude the contract and create a binding legal obligation to sell the land on March 1, 1976. Our attention is directed to paras. 5 and 1 of the respondent's statement of claim which, according to the appellants, are crucial as they form the basis of the respondent's case that an enforceable agreement was only concluded sometime on March 29, 1976. And the learned Judge failed to direct his mind to these averments, instead two dates, March 1 and March 3, 1976 which were untenable. It is pointed out that

A according to PW1's own testimony the sale was still negotiated even after March 5, 1976. It is also pointed out that the last para. of the letter from the respondent's solicitors sent to the appellants' solicitors forwarding the draft agreement for approval and execution clearly shows that execution became an important element. It is argued that the payment of an additional deposit confirms that by March 5, 1976 there had not yet been a concluded contract.

C With respect we cannot accept. There is clearly emerged from the pleadings that March 1, 1976 is not the date relied upon by the respondent as being the date on which the contract was concluded. We cannot conceivably draw from the appellants' letter of March 1, 1976 something more than an expression of a firm intention on the part of the appellants to sell the said land. D What transpired thereafter was that pursuant to the letter PW2, an estate valuer of C.H. Williams, acting on behalf of the respondent, negotiated for the purchase of the said land at \$5.20 per sq. ft., and a definite agreement was secured from the appellants for the sale of the said land. E Hence the letter of March 3, 1976 followed by the letter of March 5, 1976 in the latter case from the respondent's solicitors to the appellants' solicitors confirming the sale of the said land.

F The learned Judge did refer to the letter of March 1, 1976 in the course of his judgment but what seems apparent to us is that the learned Judge was in this regard referring specifically to this letter mainly to support his finding that the appellants had in fact a firm intention to sell the said land at the price quoted subject to contract. We are unable to discern any error of either law or G fact on the part of the learned Judge for it is clear that the learned Judge fully appreciated that the only issue to be considered was whether there was in fact and in law a concluded contract of sale between the parties on March 3, 1976. He properly H considered the issue and gave his reasons at pages 7 to 15 of his judgment before making a finding that there clearly existed the intention of the parties to conclude a contract on March 3, 1976 when the appellants agreed orally to the offer made by Mr. Chan on behalf of the respondent.

I The next question is: was there a specific allegation by the respondent that there was a concluded contract on March 3, 1976. There was: it is set out in para 3(a) of the statement of claim. Mr. Abraham counsel for the respondent does not deny that the way the pleadings have been

drawn up has left much to be desired. We think so, too, however, any defect would seem to relate only to form and not substance. Ideally para 3(a) ought to have come first, i.e. before para 1 of the statement of claim in which event the issue that the learned Judge viewed to be the real issue for him to determine would have clearly and unmistakably emerged. The question of negotiation or renegotiation plainly did not arise. There was indeed disclosed some sort of a departure from the terms in particular with regard to the additional deposit required by the appellants but that was brought about solely by and at the instance of the appellants. There was nothing to show that at any time the respondent departed from any of the terms originally agreed. The only matter outstanding to complete the deal, in so far as the respondent was concerned, was the formal execution of the agreement.

One of the other grounds advanced by the appellants is that the learned Judge erred in law in admitting the respondent's affidavit in an application for consolidation of Malacca High Court Civil Suit No. 157 of 1978 and the present suit. It is submitted that in admitting this affidavit evidence prejudicial to the appellants was thus admitted. We see no substance in the submission. The affidavit in question was an affidavit connected with this suit and filed by the appellants in an application to consolidate this suit with another suit. The learned Judge rejected the application but nevertheless admitted the affidavit, to be precise, the documents exhibited to the affidavit stating that "an application for consolidation of the two suits refers to the proceedings common to both the suits and would therefore form part of the proceedings in both suits. The documents exhibited to an affidavit form as much part of the affidavit as if they have been actually annexed to and filed with it — see *Palaniappa Chettiar v. Tan Jan & Anor.*⁽⁵⁾ Thus they are clearly admissible in the present proceedings."

We hardly see any fault in that and we cannot see why the Judge should be precluded from looking at the affidavit. There was also nothing prejudicial to the appellants. The averments in the affidavit do not substantially differ from the undisputed facts already before the Judge. This is evidenced from the finding made by the Judge when he said "The above written statements also convey to my mind the unmistakable intention of the defendants to treat the oral agreement made on March 3, 1976 as a concluded contract."

A Counsel for the appellants argues that *Palaniappa Chettiar's* case is distinguishable. We do not see any significant distinction. *Palaniappa Chettiar's* is in effect an authority for the proposition that "exhibits to an affidavit formed part of the affidavit as if they had been copied out in the affidavit....." Since the documents were in fact attached to the affidavit, we see no reason to hold that the learned Judge was disentitled to look at the affidavit and the documents annexed to it.

C Grounds 8 and 9 have not been vigorously pursued by the appellants. In any event we hardly think they merit detailed examination. It is to be observed however that ground 9 is basically directed to a question of fact. Although the question of construction may well be a question of law, much we think depends on a finding of fact arrived at by the learned Judge after considering the circumstances surrounding the particular case.

E The learned Judge found that time was no longer of the essence of the contract and the appellants were disentitled to abandon the contract because of the short period arbitrarily imposed on the return of the contract and the failure to notify the respondent of their intention to abandon it. Against this the appellants contend that it is against the weight of evidence. We are satisfied that it is not. There is abundance of evidence for the learned Judge to make such a finding.

G The learned Judge followed *Wong Kup Sing v. Jeram Rubber Estates Ltd.*⁽¹³⁾ The facts of that case are not on all fours with the facts of the present case. Nevertheless we form the view that the *ratio decidendi* in that case is applicable to the present case.

H Now the only question we should perhaps draw our attention to is the meaning of the term "subject to contract."

I It seems appropriate to reiterate that the averment that the contract was concluded on March 3, 1976 was specifically admitted by the appellants. We appreciate, nonetheless, that the appellants qualified this by saying that the contract was subject to contract meaning, we surmise, subject to further terms to be negotiated and formal agreement to be executed. If indeed that was the contention then the first question that calls for determination is whether there were other terms that had to be negotiated? The further

question is whether there was any outstanding condition agreed upon by the respondent that he failed to fulfil.

The incontrovertible facts which gave rise to the findings made by the learned Judge show very clearly that all the terms and conditions of sale necessary to conclude a contract had been agreed upon by the parties of March 3, 1976. There was no stipulation that the contract was not to be binding until execution of a formal contract, indeed to make the formal execution of the contract an essential condition for its conclusion.

The words "subject to contract" have surfaced in the course of the proceedings before the learned Judge from a letter sent by the appellants to Melaka Branch of C.H. Williams, Talhar & Wong Sdn., but the letter itself was not a proved exhibit before the court even though they sought to rely on this so-called essential condition.

Mr. Abraham adopts two lines of arguments — first: cases on "subject to contract" relied upon by the appellants are not applicable to the present appeal for reasons —

- (a) that the letter of March 1, 1976 did not form part of the evidence as it was not tendered as an exhibit; it was from the appellants to the estate agent and it was not from the respondent to the appellants;
- (b) the agreed sale price concluded on March 3, 1976 was different from the sale price quoted in the letter. The purported term or condition, if any, which the appellants want it to be read as containing in the phrase "subject to contract" cannot be introduced in a subsequent event;
- (c) the rejection by the learned Judge of the view advanced by the appellants to the effect that the term "subject to contract" indicated that the appellants did not intend to conclude the contract until the execution of the proper documents and that this letter formed part of the transaction and the term should be read with and into the terms of the other letters as well as the respondent's pleadings.

There is substance in the argument. The letter of March 1, 1976 may well have been a starting point leading to the further events that followed. Too much cannot, we think, be read into the letter other than an expression by the appellants to sell the said land at the price quoted subject

of course to a contract to be concluded. It makes sense because no negotiation had yet taken place. It was otherwise after Mr. Chan (PW 2) had, pursuant to a negotiation with the appellants on March 3, 1976 secured the agreement of the appellants to sell the said land on terms orally agreed between them.

The second, in fact, the main line of the respondent's argument is that the position of the parties falls into the second category of the exposition given by Mr. Justice Parker in *Von Hatzfeldt-Wildenburg v. Alexander*⁽¹⁴⁾ at pp. 288-289 where it stated —

"It appears to be well settled by the authorities that if the documents or letters relied as constituting a contract contemplates the execution of a further contract between the parties it is a question of construction whether the execution of the further contract is a *condition* or *term* of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case, there is a binding contract and reference to the more formal document may be ignored."

By the second category the respondent is in effect saying that phrase in the letter of March 1, 1976 relied upon by the appellants as constituting or forming part of a contract contemplating the execution of a further contract should fundamentally be construed as a mere expression of the parties as to the manner in which the transaction already agreed to should in fact go through and not as a condition or term of the bargain. Thus it is submitted that reference to the execution of a formal document can, in the circumstances of the present appeal, be ignored.

Here again we choose to hold that for the appellants to rely on formal execution of a contract as an essential condition of the bargain it certainly cannot be founded on the basis of the letter of March 1, 1976 but fundamentally on a finding of fact, if any, that in the circumstances of this case it was indeed a condition or term of the contract. No such finding was made by the learned Judge and we see nothing to contradict that finding. Even assuming for a moment that term "subject to contract" as contained in the appellants' letter of March 3, 1976, we see no reason to construe the phrase as anything more than, to borrow the words used in *Von Hatzfeldt-Wildenburg's* case, "a mere expression of the desire of the parties as to the manner in which the trans-

action already agreed to will in fact go through.” We refer to and respectfully agree with the exposition of the principle in *Master v. Cameron*⁽¹⁵⁾ cited with approval in *Daiman Development Sdn. Bhd. v. Matthew Lui Chin Teck*.⁽¹⁶⁾

The weaknesses of the appellants' case are, in our view, exposed by the events that followed beginning from the letter sent by C.H. Williams dated March 3, 1976 and the further letter from the respondent's solicitors to the appellants' solicitors confirming the essential terms of the oral contract concluded on March 3, 1976 in respect of which no disagreement whatsoever was raised by the appellants until March 22, 1976 when out of the blue they asked for a 20% instead of 10% agreed earlier and further asked that the remaining deposit of \$45,447.68 be forwarded by March 31, 1976 in order to enter into a binding contract failing which the negotiation for the sale and purchase would be treated as abortive. Even though this was a departure from the term agreed upon by the parties the respondent nevertheless within a reasonable time, complied with the request. What clearly emerges from the appellants' letter of March 22, 1976 was that not only there was a departure from one of the terms of the concluded contract but also an imposition by the appellants of an arbitrary short period for the respondent to comply. In our view, there was a reckless attempt on the part of the appellants to abort the contract.

The respondent's counsel cited a number of authorities to support his submission that a construction of the documents and a review of the documents indicate in no uncertain terms that a formal contract was not a condition. We choose only to note these cases, they are the following: *Bonnewell v. Jenkins*⁽¹⁷⁾ *Bolton Partners v. Lambert*⁽¹⁸⁾ *Shankarlal Narayandas Mundade v. New Mofussil Co. Ltd.*⁽¹⁰⁾ *Griffiths v. Young*⁽⁶⁾ *Godecke & Anor. v. Kirwan*⁽¹⁹⁾ *Daiman Development Sdn. Bhd. v. Matthew Lui Chin Teck & Anor.*⁽¹⁶⁾ Some of these cases were already considered by the learned Judge in his grounds of judgment.

It is our finding that, in the light of all the circumstances of this case, the learned Judge had not erred either in law or fact in arriving at the finding that he did. It is also our finding that on the evidence and the exhibits it was the intention of the parties to come to a definite and complete agreement on the subject of the sale and the mere fact that a written contract had to be drawn

up and executed by them did not necessarily mean that there was no legally binding and enforceable agreement. (See *Harichand v. Govind*)⁽⁹⁾. In our judgment a legally binding and enforceable agreement was concluded on March 3, 1976. For reasons we have stated this appeal is accordingly dismissed with costs.

Appeal dismissed

Solicitors: *Shook Lin & Bok; Ting Poi Tek & Co.*

THEIN THAM SANG v. UNITED STATES ARMY MEDICAL RESEARCH UNIT & ANOR.

[F.C. (Wan Suleiman, Seah & Mohamed Azmi
F.JJ) January 1 & March 30, 1983]

[Kuala Lumpur – Federal Court Civil Appeal No. 80 of
1982]

Administrative Law – Mandamus – Industrial Court – Application by workman for reinstatement – Death of workman before hearing – Whether proceedings abated on death – Application by personal representative to continue proceedings – Refusal of Industrial Court – Industrial Relations Act, 1967, s. 20(3).

Industrial Law – Application by workman for reinstatement – Death of workmen before hearing by Industrial Court – Proceedings struck out – Application by personal representative to continue proceedings – Industrial Relations Act, 1967, s. 20(3).

In this case one Elizabeth Thein had been summarily dismissed by her employer, the first respondent. She made representations and her complaint was referred to the Industrial Court. Before the reference could be heard she died. Her widower and personal representative (the appellant) applied to continue the proceedings in the Industrial Court but the Industrial Court held that the proceedings had abated with the death of the workman and struck out the proceedings. The appellant applied for an order of mandamus to order the President, Industrial Court, to carry on the proceedings but the application was refused in the High Court – see [1983] 1 M.L.J. 97. The appellant appealed.

Held, a claim under section 20(3) of the Industrial Relations Act is personal to the non-union workman and it abates on the death of the workman. The maxim *actio personalis moritur cum persona* applies to the facts of this case.

Case referred to:

(1) *Assunta Hospital v. Dr. A. Dutt* [1981] 1 M.L.J. 115.